

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 02-10685
Chapter 13

MILLARD R. DAVIS AND
SUE N. DAVIS

Debtors.

MEMORANDUM DECISION

This Chapter 13 case is before the Court upon the Motion for Hardship Discharge pursuant to 11 U.S.C. § 1328(b), filed by Millard R. Davis and Sue N. Davis (“Debtors”). After hearing argument on this matter on August 3, 2005, the Court took the matter under advisement. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1334(b). This motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), and (O). For the reasons stated herein, the Debtors’ Motion for Hardship Discharge is DENIED.

I. FINDINGS OF FACT

The Debtors filed a petition for relief under Chapter 13 of the United States Bankruptcy Code on March 29, 2002. (Doc. 1). By Order of this Court dated June 13, 2002, the Debtors’ plan was confirmed. (Doc. 9). At the time of plan confirmation, Schedule I of the petition indicated a combined monthly income of \$5,101.00, which included the Debtors’ social security disability benefits as well as children’s benefits received by the Debtors as a result of caring for several children in their household. (Doc. 1). The total amount to be paid into the plan each month was \$545.00. (Doc. 1). It

was determined at the August 3, 2005 hearing that the Debtors have made steady progress under the plan, paying in excess of \$14,000.00 to unsecured creditors. On June 15, 2005, the Debtors filed amended Schedules I and J, reflecting a loss of monthly income due to one child obtaining the age of majority. The Debtors filed their Motion for Hardship Discharge on this date, citing as a basis a loss of \$1,129.00 per month. (Doc. 26). The Debtors are not employed and the income they receive from social security benefits is the primary source of funding for their Chapter 13 plan. Taking into account the recent loss of \$1,129.00 per month, the Debtors' combined monthly income now stands at \$4,237.75. (Doc. 25).

II. CONCLUSIONS OF LAW

A court may grant a hardship discharge to a debtor who has not completed the payments contemplated by the plan if the debtor's failure is due to circumstances for which the debtor should not be held accountable. More specifically, § 1328(b) sets forth three independent requirements that must be satisfied by a debtor before becoming eligible for a hardship discharge. Section 1328(b) provides as follows:

At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

- (3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. § 1328(b). The burden of proof with respect to each element rests with the Debtors. *Bandilli v. Boyajian (In re: Bandilli)*, 231 B.R. 836, 839 (B.A.P. 1st Cir. 1999); *In re: Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001); *In re: White*, 126 B.R. 542, 545 (Bankr. N.D. Ill. 1991).

There have been no serious questions raised as to whether or not the Debtors have demonstrated satisfaction of the best interests test contemplated by § 1328(b)(2). *See In re: Cummins*, 226 B.R. 852, 856 (the “best interest test” required under § 1328(b)(2) is identical to that required for confirmation of a Chapter 13 plan in 1325(a)(4)); *see also In re: Schleppi*, 103 B.R. 901, 904 (Bankr. S.D. Ohio 1989)(citation omitted)(noting that the only distinction between the best interest test under § 1328(b)(2) and § 1325(d)(4) is that their “temporal perspectives differ”). As noted by the Chapter 13 Trustee at the August 3, 2005 hearing, the Debtors have met this requirement.

Rather, whether a hardship discharge is warranted in this case hinges upon the Debtors’ showing, or lack thereof, that their failure to complete plan payments is due to circumstances for which the Debtors should not be held accountable. Courts are split on the issue of whether or not a hardship discharge should be allowed only where the debtor has suffered “catastrophic circumstances.” The majority of courts that have addressed this issue have concluded that a hardship discharge is limited to those cases in which a debtor can demonstrate “catastrophic circumstances.” *See In re White*, 126 B.R. 542, 545 (stating that a “[h]ardship discharge under § 1328(b) is reserved for the truly worst of the awfuls—something more than just the temporary loss of a job or temporary physical

disability”)(citation omitted). *Cf. In re: Harrison*, 1999 Bankr. LEXIS 1830, at * 3-4 (Bankr. E.D. Va. 1999)(noting that there is an emerging minority of courts that take a less stringent approach to the determination of which circumstances may be sufficient for a hardship discharge); *see also In re: Bandilli*, 231 B.R. 836, 840 (the court was “unwilling to read the word catastrophic into the statute”); *In re: Edwards*, 207 B.R. 728, 730 (Bankr. N.D. Fla. 1997)(the court was unable to conclude that the law mandated a demonstration of catastrophic circumstances).

This Court is not inclined to require that the Debtors show the existence of “catastrophic circumstances” as a prerequisite to obtaining a hardship discharge. Congress has not explicitly set the bar that high. However, in light of the evidence presented at the hearing, the Debtors have not demonstrated that their failure to complete their plan payments were due to circumstances for which they should not be held accountable. The Debtors assert that they have satisfied this element because their combined monthly income has been reduced due to the fact that “one of the children receiving social security benefits [has] obtain[ed] the age of majority.” (Doc. 26). However, this circumstance clearly was foreseeable by the Debtors at the time of plan confirmation and could have been dealt with accordingly by a reduction in overall expenses or by some other reasonable means, thereby precluding the filing of the instant motion. The Court does not view the foreseeable loss of income due to one child obtaining the age of majority for purposes of social security benefits as the type of hardship envisioned by Congress when it inserted the language of § 1328(b)(1). In addition, even with the loss of income, the Debtors continue to have a combined monthly income of \$4,237.75. This is not an insubstantial amount of income by any means,

particularly in light of a \$545.00 monthly plan payment. The Debtors also have a \$2,031.00 monthly mortgage payment. The Court does not find it unreasonable to presume that if the Debtors are able to make a \$2,031.00 mortgage payment, it would be feasible for them to make a \$545.00 monthly plan payment. Considering the circumstances of the Debtors as a whole, the loss of income due to one child obtaining the age of majority was certainly a foreseeable event and therefore cannot be considered one in which they should not be held justly accountable for. Clearly, the Debtors must have been fully aware that this day would eventually come. Furthermore, the Debtors have failed to explain in convincing fashion to the Court why in light of a combined annual income in excess of \$50,000.00, they are unable to make their monthly plan payments in the amount of \$545.00. The Court also notes that the Debtors have also failed to show that the “modification of the plan under section 1329 of this title is not practicable” pursuant to § 1328(b)(3). *See In re: Bandilli*, 231 B.R. 836, 839 (debtors’ failure to satisfy this single element is sufficient to support the denial of the hardship discharge)(citing *In re: White*, 126 B.R. 542, 544 (Bankr. N.D. Ill. 1991); *In re Schleppi*, 103 B.R. 901, 904 (Bankr. S.D. Ohio 1989)). For these reasons, the Court finds that the Debtors have failed to satisfy all of the requirements set forth in § 1328(b) for purposes of obtaining a hardship discharge.

III. CONCLUSION

For the reasons expressed above, the Court concludes that the Debtors’ Motion for Hardship Discharge is due to be DENIED. The Court will enter an Order consistent

with the findings of fact and conclusions of law stated within this Memorandum Decision
by way of a separate document.

Done this 4th day of October, 2005.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Ray T. Kennington, Attorney for Debtors
Debtors
Curtis C. Reding, Trustee